

# SUPREME COURT OF THE UNITED STATES

PERRY HOO v. UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 87-5620. Decided January 19, 1988

The petition for a writ of certiorari is denied.

JUSTICE WHITE, dissenting.

The issue presented by this petition for certiorari is what is the correct test for determining if prosecutorial preindictment delay amounts to a violation of the Due Process Clause of the Fifth Amendment. See *United States v. Lovasco*, 431 U. S. 783 (1977). In this case, the petitioner argued that he was prejudiced by the prosecutorial delay in filing the indictment against him, for it was filed 13 days after he turned 21 years of age, and consequently he was ineligible for the protections of the Juvenile Delinquency Act, 18 U. S. C. § 5031 *et seq.* (1982). The Second Circuit held that there was no due process violation because petitioner "made no showing of an improper prosecutorial motive." 825 F. 2d 667, 671 (CA2 1987). Other Circuits have similarly required a showing of prosecutorial misconduct designed to obtain a tactical advantage over the defendant or to advance some other impermissible purpose in order to establish a due process violation. *United States v. Ismaili*, 828 F. 2d 153, 166 (CA3 1987); *United States v. Lebron-Gonzalez*, 816 F. 2d 823, 831 (CA1), cert. denied, 108 S. Ct. 135, and 166 (1987); *United States v. Caporale*, 806 F. 2d 1487, 1514 (CA11 1986), cert. denied, 107 S. Ct. 3191, and 3265 (1987); *United States v. Jenkins*, 701 F. 2d 850, 854-855 (CA10 1983). Two Circuits, however, have concluded that intentional misconduct is not the *sine qua non* for a due process violation from prosecutorial preindictment delay, and instead they hold that the proper inquiry is to balance the prejudice to the defendant against the Government's justification for delay. *United States v. Valentine*, 783 F. 2d 1413, 1416 (CA9 1986); *United*

*States v. Automated Medical Laboratories, Inc.*, 770 F. 2d 399, 403-404 (CA4 1985). Exemplifying the significant disagreement in the lower courts over the proper test, panels in the Fifth and Seventh Circuits have acknowledged conflicts between decisions from their own Circuits on this issue. *Dickerson v. Louisiana*, 816 F. 2d 220, 229, n. 16 (CA5), cert. denied, 108 S. Ct. 352 (1987); *United States v. Hollins*, 811 F. 2d 384, 387-388 (CA7 1987). The continuing conflict amongst the Circuits on this important question of constitutional law requires resolution by this Court; I would grant certiorari.